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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 528

THE CITY OF LOS ANGELES, *Petitioner*,

v.

CITIZENS UTILITIES COMPANY and CALIFORNIA PACIFIC UTILITIES COMPANY, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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The City of Los Angeles joins the United States in praying that a writ of certiorari issue to review the judgments of the United States Court of Claims entered in the above cases on March 6, 1957.

OPINION BELOW

The opinion of the Court of Claims is reported in 149 Federal Supplement, at page 158, attached hereto as Appendix B, *infra*, pp. 14a-22a.

JURISDICTION

The judgments of the Court of Claims were entered on March 6, 1956, (Appendix B, *infra*, pp. 14a-22a). Petitions for rehearing were denied by that Court on June 5, 1957, (Appendix C, *infra*, p. 23a). By Order of Mr. Justice Harlan dated August 29, 1957, the time was extended in which petitioner could file for a writ of certiorari until and including October 3, 1957 (Appendix D, *infra*, p. 24a). The jurisdiction of the Court is invoked under 28 U.S.C., Section 1255.

QUESTION PRESENTED

Pursuant to the Boulder Canyon Project Act and Boulder Canyon Project Adjustment Act, the Secretary of the Interior allocated all of the firm energy to be generated at Hoover Dam from 1937 until 1987 among nine allottees who contracted to pay therefor the rates required to meet all costs and repay the Government's investment with interest during that fifty year period. As an accommodation to one allottee which was unable, during its load-building phase, to use all the energy for which it was paying, the Secretary resold, for that allottee's account, a portion of its unused energy to the respondents for a term of fifteen years under contracts which contained no provision for renewal. Do the provisions of the Boulder Canyon Project Act and Boulder Canyon Project Adjustment Act require the United States, upon expiration of these resale contracts, to renew them to 1987 as obligations of the Government, notwithstanding its contracts allocating the same energy to others, or pay damages for failing to so renew?

STATUTES AND REGULATION INVOLVED

The pertinent provisions of the Boulder Canyon Project Act, 45 Stat. 1057 (43 U.S.C., 617 et seq.), the Boulder Canyon Project Adjustment Act, 54 Stat. 744 (43 U.S.C. 618 et seq.) and of the Regulations adopted pursuant thereto are set out in Appendix A, *infra*, pp. 1a-13a.

STATEMENT

The Boulder Canyon Project Act (Act of December 21, 1928, 45 Stat. 1057) authorized the Secretary of the Interior to construct a dam (now known as Hoover Dam) and power plant, but only on condition (Sec. 4(b)) that in advance of construction he obtain contracts for sale of power adequate to return all costs, with interest on the Government's investment, within fifty years. The statute (Sec. 5) directed the Secretary to contract only with purchasers who would meet these revenue requirements, giving preference, in event of conflicting applications, to public agencies. This was done. He fixed a time within which applications must be submitted. (Respondents did not apply.) The Secretary thereafter, by regulations, allocated 100 per cent of the firm energy to be generated for fifty years as follows: Nine per cent to privately-owned utilities, to be underwritten by Southern California Edison Company, nineteen per cent to municipalities, to be underwritten by the City of Los Angeles, thirty-six per cent to the Metropolitan Water District of Southern California for pumping water into and in its Colorado River Aqueduct, eighteen per cent to Arizona, eighteen per cent to Nevada. The allocations to the two States were options. All others were firm commitments, to be paid for whether used or not, and, in addition, Los Angeles and the Edison Company were re-

quired, in equal shares, to take the power allocated to Arizona and Nevada if not contracted for by those States. Los Angeles, the Edison Company, and the District thus became liable for 100 per cent of the firm energy. Los Angeles and the Edison Company were given options, in equal shares, on any unused District energy, but were not obligated to buy it.

Contracts were executed by the Secretary on this basis in 1930 with Los Angeles, the Edison Company, and Metropolitan Water District, and were reported to Congress.[1] Appropriations in reliance thereon were made and the dam and power plant completed June 1, 1937. The fifty year contract period thus ends May 31, 1987.

The largest block of firm power, 36 per cent, was allocated to the Metropolitan Water District, but limited to use for pumping Colorado River water into and in its aqueduct from that river some 240 miles to the coastal plain. As this full quantity would not be needed for that purpose during the aqueduct's load-building period (the aqueduct began operation in 1940 and is expected to reach full load about 1970), the 1930 contracts authorized the Secretary, if requested by the District, to sell for the District's account its temporarily unused energy, but gave the City and Edison Company the first right to purchase it.[2] The District re-

[1] The allocation pattern was completed by contracts made in 1931 with Pasadena, Glendale, Burbank, Los Angeles Gas and Electric Corporation and the predecessor of California Electric Power Company. The City of Los Angeles subsequently acquired the properties and allocation of Los Angeles Gas and Electric Corporation.

[2] The California Electric Power Company succeeded to a part of the Edison commitment.

mained liable for the full amount, subject to any credits thus received.

Between 1938 and 1945 a number of such Metropolitan resale contracts were made by the Secretary with third parties, all for relatively short fixed terms, none for fifty years. Among them were the two contracts with respondents, made in 1938, for a fifteen-year period expiring, in terms, December 31, 1954, and, like all the resale contracts, containing no provision for renewal. (Citizens Utilities Company, operating in Arizona, did not seek a share of Arizona's 18 per cent allocation.)

The Boulder Canyon Project Adjustment Act (Act of July 19, 1940, 54 Stat. 774) authorized the Secretary of the Interior to effect a rate reduction at Hoover Dam, replacing the rate base established by the Project Act (which was related to the competitive cost of steam-generated power, and which was producing revenues considerably in excess of the costs which the Secretary was required to recover by section 4(b) of the Project Act) with a rate base related primarily to amortization of the Government's investment with interest, plus operation, maintenance, and certain surcharges not important here. The new act directed that new contracts be made and all existing contracts be cancelled, as a condition to obtaining the new and more favorable rates. This was done. But section 12 provided:

> "'Firm energy' and 'allottees' shall have the meaning assigned to such terms in regulations heretofore promulgated by the Secretary and in effect at the time of enactment of this Act: . . ." (Sec. 12, 54 Stat. 788, 43 U.S.C. 618k)

By regulations dated May 20, 1941, the Secretary allocated 100 per cent of the firm energy for the period

ending May 31, 1987, to allottees named in the 1930 allocation: the States of Arizona and Nevada, Metropolitan Water District, Los Angeles, Pasadena, Glendale, and Burbank, Southern California Edison Company, and California Electric Power Company.[3] As before, the unused Metropolitan energy was required to be offered to the City of Los Angeles, Edison Company, and California Electric Power Company before resale to others. The present plaintiffs, California Pacific and Citizens Utilities, were not named as allottees. The nine allottees made the required firm contracts in 1941, expiring May 31, 1987 (fifty years from the completion of Hoover Dam), with an express right of renewal at that time "upon such terms and conditions as may be authorized or required under the then existing laws and regulations", unless the property "dependent for its usefulness on a continuation of this contract be purchased or acquired", etc. Upon underwriting the project as required by the 1940 Adjustment Act, their old contracts were terminated, and the Secretary proclaimed the new act in effect.

This resulted in a voluntary rate reduction to the respondents. By new contracts with the Secretary made in 1941, under the Adjustment Act, with Metropolitan Water District's assent, respondents' 1938 contracts were cancelled and the new rates were made applicable to the energy for which they paid and for which the District received credit. The new contracts, like the old, specified December 31, 1954, as their ex-

[3] The 1930 allocations were in whole percentages, e.g., 18%, of 4,240,000,000 kwh. per year. The 1941 allocations are for the same quantities of energy but in lesser percentages, e.g., 17.6259%, because stated in percentages of 4,330,000,000 kwh., in consequence of an increase in the height of the dam.

piration date and, like the old, contained no provisions for renewal, or for compensation if not renewed. The respondents were not obligated to 1987 by these contracts, indeed not at all beyond 1954. Their contracts were primarily options, the obligations amounting in each case to only about one-seventh of the optioned quantity. They were in no sense fifty year underwriting contracts, as described in the Project Act or Adjustment Act, and as executed by the nine allottees.

It is upon these two 1941 contracts that respondents sued below in the Court of Claims, in consequence of the following events:

By a multi-partied contract dated May 31, 1945, the City of Los Angeles, Southern California Edison Company, and California Electric Power Company agreed to buy and the Secretary agreed to sell all unused District energy not previously sold, for the full statutory amortization period ending May 31, 1987; all obligations of the Reconstruction Finance Corporation (which had been buying unused District energy for war plants) were ended; and the District approved.[4]

On December 31, 1954, the respondents' two contracts expired.[5] They demanded renewal to May 31, 1987. The Secretary of the Interior refused. They thereupon brought these actions for damages against the

[4] On May 31, 1957, the District notified the purchasers under the 1945 contract that after May 31, 1959, no unused energy will be available.

[5] Until December 31, 1954, respondents received all the power they demanded. During the fifteen years that these contracts were in force, 1938-1954, the two respondents were obligated to take about 1067 million kilowatt hours annually, had an option on 70 million per year, and, in fact, used an average of about 30 million annually.

United States, claiming about $17,000,000. The United States impleaded the City, District, Edison Company, and California Electric Power Company as third parties.[6]

Respondents, notwithstanding the expiration date of their contracts, December 31, 1954, and the absence of any contractual provision for renewal, assert that they have a built-in statutory right of renewal arising from section 5 (b) of the Boulder Canyon Project Act. Section 5 provides, *inter alia*:

> "Sec. 5. That the Secretary of the Interior is hereby authorized, under such general regulations as he may prescribe, to contract for the storage of water in said reservoir and for the delivery thereof at such points on the river and on said canal as may be agreed upon, for irrigation and domestic uses, and generation of electrical energy and delivery at the switchboard to States, municipal corporations, political subdivisions, and private corporations of electrical energy generated

[6] Rule 19 of the Court of Claims provides:

"Rule 19. Third-Party Practice.

(a) When Third Parties May Be Brought In: The Court on its own motion or on the motion of either party may (1) notify any and all persons with legal capacity to sue and be sued and who appear to have an interest in the subject matter of any pending suit to appear as a party or parties and assert their interest therein; or (2) on motion of the Attorney General may summon any such third person or persons against whom the United States may be asserting a claim or contingent claim for the recovery of money paid by the United States in respect of the transaction or matter which constitutes the subject matter of the suit to appear as a party or parties and defend their interest, if any, in such suit. Such motion if made by plaintiff shall be filed at the time the petition is filed; if made by the United States, it shall be filed on or before the date on which it is required to answer."

at said dam, upon charges that will provide revenue which, in addition to other revenue accruing under the reclamation law and under this Act, will in his judgment cover all expenses of operation and maintenance incurred by the United States on account of works constructed under this Act and the payments to the United States under subdivision (b) of section 4. Contracts respecting water for irrigation and domestic uses shall be for permanent service and shall conform to paragraph (a) of section 4 of this Act. No person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract made as herein stated.

* * *

"General and uniform regulations shall be prescribed by the said Secretary for the awarding of contracts for the sale and delivery of electrical energy, and for renewals under subdivision (b) of this section, and in making such contracts the following shall govern:

(a) No contract for electrical energy or for generation of electrical energy shall be of longer duration than fifty years from the date at which such energy is ready for delivery.

* * *

"(b) The holder of any contract for electrical energy not in default thereunder shall be entitled to a renewal thereof upon such terms and conditions as may be authorized or required under the then existing laws and regulations, unless the property of such holder dependent for its usefulness on a continuation of the contract be purchased or acquired and such holder be compensated for damages to its property, used and useful in the transmission and distribution of such electrical energy and not taken, resulting from the termination of the supply.

"(c) Contracts for the use of water and necessary privileges for the generation and distribution of hydroelectric energy or for the sale and delivery of electrical energy shall be made with responsible applicants therefor who will pay the price fixed by the said Secretary with a view to meeting the revenue requirements herein provided for. In case of conflicting applications, if any, such conflicts shall be resolved by the said Secretary, after hearing, with due regard to the public interest, and in conformity with the policy expressed in the Federal Water Power Act[7] as to conflicting applications for permits and licenses, except that preference to applicants for the use of water and appurtenant works and privileges necessary for the generation and distribution of hydroelectric energy, or for delivery at the switchboard of a hydroelectric plant, shall be given, first, to a State for the generation or purchase of electric energy for use in the State, and the States of Arizona,

[7] Section 7 of the Federal Water Power Act (Federal Power Act, 16 U.S.C. 800) provides:

"§ 800. Preferences in issuance of preliminary permits or licenses

"(a) In issuing preliminary permits hereunder or licenses where no preliminary permit has been issued and in issuing licenses to new licensees under section 808 of this title the Commission shall give preference to applications therefor by States and municipalities, provided the plans for the same are deemed by the Commission equally well adapted, or shall within a reasonable time to be fixed by the Commission be made equally well adapted, to conserve and utilize in the public interest the water resources of the region; and as between other applicants, the Commission may give preference to the applicant the plans of which it finds and determines are best adapted to develop, conserve, and utilize in the public interest the water resources of the region, if it be satisfied as to the ability of the applicant to carry out such plan."

> California, and Nevada shall be given equal opportunity as such applicants.
>
> * * *
>
> "The use is hereby authorized of such public and reserved lands of the United States as may be necessary or convenient for the construction, operation, and maintenance of main transmission lines to transmit said electrical energy."

On these facts, the Court of Claims held (Opinion, p. 9, Appendix B, *infra*, p. 22a):

> "Our conclusion is that the plaintiffs were entitled, under the statute, to renewals of their contracts with the limitations which they concede,[8] and that the Government violated their statutory rights when it denied them renewals and refused to give them the electrical energy to which renewals of their contracts would have entitled them."

REASONS FOR GRANTING THE WRIT

1. The decision below imposes a permanent contractual obligation upon the United States not authorized by the Boulder Canyon Project Act or the Boulder Canyon Project Adjustment Act.

A. The respondents' contention, in essence, is that, since the Metropolitan Water District has the statutory right to demand in 1987 the renewal, commencing then, of a contract which will expire at that time, respond-

[8] "There is an apparent inconsistency in the position of the plaintiffs, in that they do not claim that their rights, under their renewals, would be as extensive as their rights under their original contracts. The plaintiffs claim only the rights to renewals which would have given them such electricity, if any, as was surplus to Water District's needs after 1951, and was within the amounts set in their original contracts." (Opinion, pp. 8-9; Appendix B, *infra*, pp. 21a-22a.)

ents had a statutory right to demand in 1954, commencing then, the renewal of a contract, expiring in that year, which entitled them to buy a portion of the District's allocation. This right of renewal is asserted by respondents (so far) for a period which expires on May 31, 1987, not a period which commences on that date. The effect of this contention, if sustained, is to require the Secretary to furnish energy to eleven allottees, instead of the nine named in his regulations. Moreover, if respondents' contracts in the present action acquire a status valid for fifty years instead of fifteen, the right to renew them will presumably be asserted again in 1987. The temporary District resale contracts, made for that District's accommodation, would thus unexpectedly be converted into Government obligations for an added 33 years, and perhaps permanently, against the will of the United States, to serve contractors not selected by the Secretary.

B. Congress, in enacting the Boulder Canyon Project Adjustment Act in 1940, relied upon the credit of nine allottees who undertook a firm obligation for 100 per cent of the firm energy for fifty years. In authorizing lower rates which gave up the former margins of safety, and would amortize the Government's investment in Hoover Dam only if all nine allottees paid all their power bills for all the firm energy, Congress stipulated (Sec. 12):

> "'Firm energy' and 'allottees' shall have the meaning assigned to such terms in regulations heretofore promulgated by the Secretary and in effect at the time of the enactment of this Act."

Congress knew nothing of these two self-styled allottees who were not bound for more than about 15 per

cent of the energy optioned to them at the District's behest, and not bound at all beyond fifteen of the required fifty years. These options, held by parties unknown to Congress, were not contracts of the firm quality required by the Adjustment Act of the nine allottees whose names were disclosed to Congress.

C. Manifestly, the Government, had it wanted to, could not have enforced these contracts beyond 1954. They were not fifty year firm contracts, as required by sections 4 (b) and 5 of the Boulder Canyon Project Act. The only contracts to which section 5 (b)'s right of renewal relates are the contracts referred to in the other paragraphs of section 5. The only contracts authorized by section 5 are those which produce revenues to the United States for fifty years as required by section 4 (b). Respondents' contracts are not for the statutory period of fifty years, are not for the statutory purpose of producing revenues for the United States, and they carry no statutory right of renewal. Had all nine allottees signed only fifteen year contracts with mere options to renew thereafter, such as those asserted by the respondents, the statutory conditions requiring fifty year firm contracts to assure repayment of the investment would not have been met, and Hoover Dam could not have been built. May the respondents, at their option, impose upon the United States implied obligations which the Secretary of the Interior could not have lawfully assumed for the United States, if their terms had been explicit?

D. Respondents' contracts were not made for the benefit of the Government, but of the Metropolitan Water District. Money paid by the respondents for power is all credited to the amount firmly owed by the

District to the United States for power, whether the District uses such power or not. Respondents' payments add not one cent to the revenues of the United States. The United States sells for the accommodation of the District, reducing that allottee's burden. The District might as well have sold for itself, but for arrangements of convenience between it and the Government, which made the Secretary a clearing-house for all energy, but which are of no concern to respondents. The Secretary had no authority, and did not purport, to burden the Boulder Canyon Project with a permanent obligation arising from a temporary contract which produced no revenues for the United States.

2. The sound administration of the Boulder Canyon Project, particularly its distinguishing feature as a self-liquidating project, is imperiled by the rationale of the decision below.

A. Respondents' contracts obligate them to take only about 15 per cent of the energy which the Government must be prepared to furnish if demanded. This imposes greater financial burdens upon the project than does the Metropolitan Water District contract. The District's load, for pumping water, is relatively constant, with little fluctuation from hour to hour or day to day. The investment in generating equipment to meet such a load is at the minimum. By contrast, if respondents have acquired a right to this power, they may demand from 15 per cent to 100 per cent of their optioned quantity, per year, to meet their utilities' load which may fluctuate from hour to hour, day to day, month to month. The Government's power generating investment is at a maximum to meet such a commitment, its energy revenues at a minimum.

B. Respondents assert an option good for fifty years on 70 million kilowatt hours per year, obtained by obligating themselves for less than a third of that time to pay for less than 15 per cent of that annual quantity—an over-all commitment to pay for less than 5 per cent of the aggregate number of kilowatt hours to which they now claim title. If the statute requires that result, then the same result could be demanded by a contractor who agreed to take one per cent of the optioned quantity for one year out of the fifty. The result decreed below is at total variance with the great distinction of Hoover Dam: the Boulder Canyon Project Act's insistence upon full self-liquidation, assured in advance by firm contracts. Respondents' options do not remotely resemble such contracts, carry none of their burdens, and imply none of their benefits.

3. The decision of the court below in renewing the contracts of the respondents (private power companies) directly violates the preference rights of the City of Los Angeles to the energy, as a public agency, both under its contract incorporating the Secretary's regulations and under the Boulder Canyon Project Act.

A. The City of Los Angeles is a public agency of the State of California, while both the respondents, the Citizens Utilities Company and the California-Pacific Utilities Company, are private corporations. The Boulder Canyon Project Act, Section 5 (c), provides:

> "In case of conflicting applications, if any, such conflicts shall be resolved by the said Secretary, after hearing, with due regard to the public interest, and in conformity with the policy expressed in the Federal water power act as to conflicting applications for permits and licenses. . . ." (Appendix A, *infra*, p. 3a.)

Section 7 of the Federal Power Act provides in such a case that public agencies shall be preferred:

> (a) In issuing preliminary permits hereunder or licenses where no preliminary permit has been issued and in issuing licenses to new licensees under section 808 of this title the Commission shall give preference to applications therefor by States and municipalities, provided the plans for the same are deemed by the Commission equally well adapted, or shall within a reasonable time to be fixed by the Commission be made equally well adapted, to conserve and utilize in the public interest the water resources of the region; and as between other applicants, the Commission may give preference to the applicant the plans of which it finds and determines are best adapted to develop, conserve, and utilize in the public interest the water resources of the region, if it be satisfied as to the ability of the applicant to carry out such plans." (16 U.S.C.A. 800)

In 1930, when the Secretary invited bids for Hoover power, a number of public and private applicants appeared. The Secretary, then faced with a choice among "conflicting applications" allocated a total of 91 per cent of the firm energy to States and other public agencies, including the City. He allotted only 9 per cent to the private companies. Had the respondents appeared as applicants then, their share if any, would had to have come out of the 9 per cent allocated for private companies. But decision of the court below, in elevating the respondents to the status of permanent allottees by giving them a statutory right of renewal, has reversed the Secretary's determination as to public power allocations required by the act. The City, as a public

agency, is entitled to the preference protection afforded by Congress in that act.

B. In 1937 when the respondents first sought Hoover power, the released unused power of the District, for the period ending December 31, 1954, was only offered to them after having first been offered to the City of Los Angeles and the named private allottees. The Secretary concluded he was bound to so offer the power to the City and the other named allottees because of the preference right to these parties expressly given in his general regulations of 1930 (Appendix A, *infra*, p. 10a). This preference right is now clearly expressed in the current 1941 regulations, under which all the present contracts were negotiated, as follows:

> "(iv) In the event the District shall fail for any reason to use all or any of the firm energy herein allotted to it, then the Secretary shall dispose of such unused energy until required by the District, crediting on the District's obligation the proceeds of such disposition as received; *provided, however, that no disposition of such firm energy shall be made by the Secretary without first giving to the City, the Company and the Nevada-California Electric Corporation the opportunity to contract on equal terms and conditions, to be prescribed by the Secretary, for such energy,* in the same proportion, and subject to the same rights with respect to proportions thereof not taken by others, as in the case of secondary energy. The rights of the City, the Company and The Nevada-California Electric Corporation so to contract shall be deemed to have been waived unless, within 30 days after offer by the Secretary of such opportunity, such offer is accepted." (Art. 4b(iv); Appendix A, *infra*, p. 13a.) (Emphasis supplied.)

Under this clause of the regulations, if unused District power were available on January 1, 1955, the

City and the other named allottees would rightfully have a preference to it. They have not waived their right thereto beyond December 31, 1954. The renewal by the court below was in direct conflict with the regulations.

Further, in 1945, the City and the other named allottees exercised their preference. By contract of May 31, 1945, between the City, and the other allottees named in the preference regulation above, *all* of the unused firm power of the District was taken by the City and the named allottees for the whole period ending May 31, 1987. (*Hoover Dam Power and Water Contracts* (1950) p. 1061; Government Exhibit 1.) The contract in Article 5 specifically referred to the outstanding resale contracts of the respondents, thus making it clear that the energy covered thereby would go to the preference holders upon their expiration on December 31, 1954. The court below expressly declined to decide the City's and other preference holders' rights under the 1945 contract, thus leaving the United States in the position, if the judgment below stands, of having sold the same power twice, to different parties.

4. This Court should grant certiorari because of the importance of the issue decided in the continued administration of the Boulder Canyon Project Act.

A. In granting a statutory right of renewal to the holder of a contract for energy temporarily unused and put up for resale through the clearing agency of the Secretary of the Interior by the original allottee owner, the decision below challenges all freedom of contract on the part of the allottees in conjunction with the Secretary to enter any temporary "term" contracts

for the sale of electric energy, regardless of the desirability of such contracts. The allottees are thus saddled with the burden of being unable to make any temporary commitments for resale, for any such commitment, under the ruling below, becomes a permanent allocation. The effect is to impede the allottees and the Secretary from taking any steps to mitigate the allottees' strict financial obligations under their contracts to underwrite the federal investment in the Boulder Canyon Project, when, under any one of a myriad of changing economic conditions, it might be necessary to do so.

The result of the decision below is bound to reflect adversely on the repayment structure of the project. It should not be left as the "law of the river" to straitjacket all future administration of the Project Act.

B. The Project Act only assures a right of renewal as of 1987, upon terms then prescribed by law, and requires that such renewals conform to general and uniform regulations. The right of renewal asserted here does not meet any of those statutory conditions. It is asserted 33 years in advance of 1987; no regulations exist which control renewals, either as to rates, duration, or any other matter; and no one knows what laws Congress may enact governing such renewals.

CONCLUSION

The decision below misconstrues the Boulder Canyon Project Act in a way to embarrass the sound financial administration of Hoover Dam's power operations. In view of the public importance of that project and the historic significance of the Boulder Canyon Project Act, particularly in the field of water resource finance-

ing here affected, certiorari should issue to review that decision.

Respectfully,

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